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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Deandrea G. Benjamin, Circuit Court Judge

Case. No. 2018-CP-001127
Appeal No. 2025-002144

Paul David Hess, Respondent-Petitioner

v.

Morphis Pediatric Group of Lancaster, PA and Elizabeth J. Morphis M.D, Gregory M. Alexander, CPA and Moore Beauston and Woodham LLP; Defendants

Of Whom Morphis Pediatric Group of Lancaster, PA and Elizabeth J. Morphis are Petitioner-Respondents

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BRIEF OF PETITIONER-RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Can a plaintiff avoid the applicable statute of limitations; despite admitting he understood he had a claim outside the limitations period, by merely alleging the opposing party withheld some information relevant to his claim?

Are money damages available for an alleged violation of the South Carolina Wage Payment Act wage change notice provisions when only an administrative fine is provided for in the remedies section of the Act?

STATEMENT OF THE CASE

Hess, who was an employee of Dr. Morphis, claimed he was underpaid bonuses allegedly promised pursuant to employment contracts. Hess asserted claims under the South Carolina Wage Payment Act, for breach of contract, and related torts. Hess also asserted claims against Defendants' accountant[1] for tortious action related to the alleged underpayment. This matter was tried before Judge DeAndrea Benjamin from January 26 through February 2, 2023. The jury returned a verdict against all defendants on all causes of action and on punitive images. Following this, with respect to Dr. Morphis and MPG, Hess elected to recover solely under Wage Payment Act. Defendants filed motions for judgment notwithstanding the verdict (JNOV) and remitter. Plaintiff filed a motion for attorney fees and trebling under the Wage Payment Act as well as a motion to recover prejudgment interest. Defendants opposed these motions. Judge Benjamin denied the motions for JNOV and Remittitur on November 2, 2022, and granted the motions for fees, trebling, and interest, also on November 2, 2022. Defendants Morphis and

[1] During pendency of the appeal, Hess settled with Defendants Alexander and Moore, Beauston, & Woodham, and they are not parties to the appeal.

MPG filed a motion on November 4, 2022 to correct under S.C. R. Civ. P. 59 on the grounds that some arguments regarding prejudgment interest had not been addressed. The court denied the motion on November 8, 2022. Defendants filed a notice of appeal on November 10, 2022. Plaintiff filed a cross-notice of appeal with regard to attorney's fees on December 5, 2022. On July 9, 2025, the Court of Appeals affirmed the trial court with the exception that it denied any pre-judgment interest and it agreed that the court abused its discretion in reducing the attorney fee award from $450 per hour to $300 per hour. All parties filed motions for rehearing and rehearing *en banc*. These motions were denied on September 22, 2025. All parties filed Petitions for Writ of Certiorari to this court on December 1, 2025. A Writ of Certiorari was granted, on two questions only, to Petitioner-Respondent on January 16, 2026. Respondent's Petition was denied.

STANDARD OF REVIEW

All questions in this appeal are questions of law which did not require fact-finding and are, therefore, reviewed *de novo*. *See, e.g. Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). A fact question is not created simply because the jury found in a plaintiff's favor on certain facts. *See, e.g., Humana Hosp.-Bayside v. Lightle*, 305 S.C. 214, 217, 407 S.E.2d 637, 638 (1991) ("Instead he relies on a sweeping legal assertion that summary judgment is always improper on the issues of negligence, fraudulent breach of contract, bad faith and punitive damages, because these are questions of fact for the jury. This is an incorrect proposition. These issues are only proper to present to the jury when there is a genuine issue as to some material fact for the jury to consider."); *Metro. Life Ins. Co. v. Stuckey*, 194 S.C. 469, 10 S.E.2d 3, 6 (1940) (differentiating fraud as a legal conclusion from facts that must be asserted to support the claim); *Towill v. S. Ry. Co.*, 121 S.C. 447, 114 S.E. 416, 420 (1922) (same).

FACTUAL BACKGROUND

Morphis Pediatric Group (MPG) is a pediatric clinic located in Lancaster South Carolina that was owned by Dr. Beth Morphis. (R.642, II.79 Lines 21-25, R.643, II.80 Lines 1-7). Morphis hired David Hess in 2009 to work as a nurse practitioner for MPG in Lancaster. (R.511, I.26, Lines 6-7).

In January 2010, Morphis offered Hess the opportunity to earn 50% of the profits of the Lancaster office. (R.507, I.22 Lines 4-10) (R.833, Plaintiff Ex. 1). Under the 2010 Agreement, Hess was paid a base salary of $100,000 and was "eligible" for an annual bonus. The bonus provisions are the basis for Hess's claims in this case. They are divided into two parts. The first part states:

> All or any bonuses shall be at the discretion of the Board or as determined in any appendix that is hereby signed and agreed upon by both parties.

There was an "appendix," and it stated:

> Provided that the employee meets criteria as decided upon by the Board, the employee will be eligible for an annual bonus paid by the company based on the following formulation.
>
> All end of the year profits generated by this above mentioned business shall be divided and the employee is granted 50% (fifty percent) of the said monies after all debts, expenses, royalties and expenditures have been allowed. These monies will be determined by the Company Accountant after the close of the year on December 31st of each calendar year and payable by the 15th of February.

(Id.).

There are no definitions of "criteria," or "debts, expenses, royalties," "eligible," or "expenditures."

Hess testified that he agreed that the "Company Accountant" was Greg Alexander. (R.566, I.81 Lines 17-23). Hess also agreed that the net income numbers shown on his own

exhibit (See R.923, Exhibit 19 on next page) agreed with the income on the year-end financial statements which had been determined by the Company Accountant (R.568, I.83, Lines 2-12) (R.569-571, I.84-86) and that he received at, or more than, 50% of the net income as determined by the Company Accountant.

Hess's claims were based on the theory that net profits, for his bonus purposes, should have excluded Dr. Morphis's salary and her automobile expenses. In other words, he claims MPG and the company accountant improperly counted these as expenses. Hess asserted at trial he was entitled to the following:[2]

Year	Gross Revenue	Net Income	Officers' Salaries	Auto Expense	Bonus Paid	Profit w/o Officer and Auto Before Split	Damages
2010	$1,116,668.87	$15,062.67	$148,662.88	$13,180.28	$75,000.00	$251,905.83	$50,952.92
2011	965,476.12	-9,359.00	180,000.00	10,786.56	25,000.00	206,427.56	78213.78
2012	1,026,916.06	520.52	330,000.00	10,838.10	46,968.48	388,327.10	147195.07
2013	1,043,897.83	23,018.93	151,000.00	11,444.50	48,000.00	233,463.43	68731.715
2014	1,191,873.15	196,623.64	81,212.80	9,100.20	48,000.00	334,936.64	119468.32
2015	1,419,101.23	374,287.42	80,000.00	758.35	70,267.41	525,313.18	192389.18
							$656,950.98

(R.923, Plaintiff Ex. 19).[3]

In February 2015, Dr. Morphis realized she had forgotten to calculate and pay Hess's bonus for 2014. At this point, Dr. Morphis felt that Hess had been harassing and intimidating her about the financial expenses, and his bonus, and she didn't want to deal with him anymore

[2] 2014 was the only year covered by the 2010 Agreement that Hess did not receive at least 50% of the net income for that year. This was due, according to Dr. Morphis, because she decided to do a capital expenditure set aside which is specifically permitted under appendix A of the Agreement. (R.704.4-704.5, II.180-181 Lines 22-25 and 1-5).

[3] The $180,000 and $330,000 Dr. Morphis received in 2011, she testified, was entirely due to a windfall reimbursement from the hospital to pay for after-hours calls and the salaries of physicians whom Dr. Morphis recruited. (R.689-690, II.144-145, Lines 25 – 12) (R.698.7, II.167 Lines 7-25) (R.702-703, II.171-172, Lines 15-13).

regarding the bonus. (R.705.4, II.191 Lines 1-7) (R.705.5, II.192 Lines 20-25) (R.705.6, II.193 Lines 1-7). She contacted Alexander on February 4, 2015, requesting he inform Hess why he was receiving his bonus late. (R.705.2, II.185 Lines 1-25). Alexander contacted Hess and informed him he would be receiving the same bonus as last year, $48,000. (R.705.3, II.186 Lines 6-13). In response, Hess questioned the numbers, to which Alexander responded he was not at liberty to share further information. As a result, Hess suggested a meeting to review the numbers used to calculate his bonus. This meeting occurred in May 2015. (R.529, I.44 Lines 15-16) (R.530-531, I.45-46 All Lines) (R. 845, Plaintiff Ex. 4).

Because of Hess's repeated questions regarding the numbers, Dr. Morphis decided to propose a new employment agreement to Hess with a simplified and easier bonus calculation that would result in bonuses comparable to Hess's past bonuses. (R.705.7, II.195 Lines 6-25) Alexander determined that Hess's bonuses for the years 2010-2014 were comparable to 5% of gross revenues. (R.705.8-705.9, II.197-198, Lines 23-25, 1-25) (R.845, Plaintiff Ex. 4).

The meeting with Hess took place on May 28, 2015. At the meeting, Hess asked Alexander if the bonuses he received previously were equal to 50% of the net profits, to which Alexander responded he could not answer that because it would divulge Dr. Morphis's personal tax information. The meeting concluded and negotiations over Hess's new employment contract continued. After the meeting, Alexander prepared a spreadsheet analysis showing Hess's previous bonuses (2010-14) were equal to an average of 5% in gross revenue as a bonus. (R.705.12, II.206 Lines 20-25; R.705.13, II.207 Lines 1-25).

In June 2015, Hess emailed that he would accept the new contract. (R.723, II.268 Lines 15-23) (R. 925, Def. Ex. 5). On December 30, 2015, Hess executed his new employment agreement which governed his bonus for 2015. (R.504, I.19) (R.912, Pl. Ex. 18). Pursuant to the

2015 Agreement, Hess would receive a bonus equal to 5% of MPG's gross receipts for the year. Hess's 2015 bonus was calculated pursuant to the 2015 Agreement. Hess was paid bonuses for 2016 and 2017 that he concedes were more than what he would have received under the 2010 Agreement. (R.600, I.129 Lines 12-25 and R.601, I.130 Lines 1-25).

ARGUMENT

The Statute of Limitations Ran Out Long before Hess Filed This Action

An action under the Wage Payment Act must be brought in three years**.** S.C. Code Ann. § 41-10-80(c). An action is commenced when the summons and complaint is filed. S.C. Code Ann. § 15-3-20(b). Pursuant to the "discovery rule," the statute of limitations begins to run when the injured "person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code. Ann. § 15-3-535; *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019). The test is objective and the South Carolina's statute of limitations requires "**very little to start the clock**." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir.1994) (applying South Carolina law) (emphasis added).

This lawsuit was filed September 27, 2018. The "cut off" date relevant to the application of the statute of limitations discovery rule is, therefore, September 27, 2015.

The court of appeals held that it was a question of fact whether or not Hess knew he had a cause of action because Morphis withheld information that she was taking a salary from MPG before net income for bonus calculations was determined.

The court, however, ignored the undisputed evidence that Hess had formed the belief that he was not being paid the correct bonus outside the statute of limitations period, that he formed the belief that income should have been higher than reported, and that he knew Morphis was

taking a salary and automobile expenses.

Q. You mentioned that you thought it was odd that you get $48,000 even as a bonus, I believe that was in 2013?

A. Two years in a row, correct.

Q. Why did you find that amount to be odd?

A. That means I would have had the exact same number of patients doing the exact same thing for two years in a row.

Q. **So it caused you to question whether or not you were getting 50 percent of the net income?**

A. Correct.

(R.557-558, I.72-73, Lines 19-25 and 1-4) (emphasis added).

Q. But you did have some access to financial information I think you said; right?

A. I had access to APRIMA and every now and then I would get a very generalized monthly expenditure report.

Q. And you testified something about, you couldn't understand why there wasn't more money?

A. Correct.

Q. **And that was a concern you had somewhere in 2010 to 2014?**

A. Right. 'Cause it showed more money coming in and there wasn't enough going out to account for the lack of bonuses.

(R.576, I.93 Lines 1-18).

A: . . . . We would rather be high on the expenditures than low on the expenditures, because that way it's a safer bet. And no matter how high we can estimate everything to be, there's -- the numbers just could never add up.

Q. **And that caused you to question in your mind whether or not you were getting the bonus?**

A. That caused a lot of things. We weren't giving the girls pay raises half the time.

Q. And your bonus was one of those things?

A. **My bonus was one of those things.**

(R.577-578, I. 94-95, Lines 20-25 and 1-5).

Hess also testified at trial that he went to great lengths to calculate what the net profit was and his number came up bigger than his bonus indicated it was. (R.551, I.65 Lines 7-25). He testified he made these efforts because he doubted his bonus was correct and he didn't think his contract was being met. (R.577-78, I.65 Lines 21-25, 1-250). When Hess spoke with Alexander in February 2015, and was informed of his 2014 bonus, Hess immediately questioned how his bonus could be the exact same as the previous year, questioned the numbers, and asked for a meeting with Alexander and Dr. Morphis to discuss the numbers. (R.527, Lines 8-19) (R. 248, Lines 18-24). This meeting occurred on May 28, 2015, and Hess testified that he asked Alexander whether he had received 50% of the profits in the past.

Q. Did you ask Mr. Alexander any questions during that meeting?

A. I did.

Q. What did you ask?

A. **I asked him if I was getting 50 percent of the profits because even though my bonus** said that, I did not actually know if that is 50 percent of the profits. That was just a number that I was given. **I specifically asked, "Am I getting 50 percent of the profits of the practice?"**

Q. And what was Mr. Alexander's response?

A. I can't divulge that information. That is Dr. Beth's private tax information.

Q. What was your response to that?

A. **I asked him not to divulge the information. That, "yes" or "no". "Am I getting 50 percent of the profits?"** You're not divulging any information, yes or no. He should know that, he's an accountant. He's the company accountant.

(R.535, I.50 lines 6-24).

Q. **And there was a meeting in May of 2015**

. . .

Q. And one of the questions you asked was, "Am I getting 50 percent of the profits?"

A. That is correct.

Q. And you asked that question in part because you thought you weren't getting 50 percent of the profits; is that correct?

A. That is correct. . . .

(R.578, I.95 Lines 6-18).

Hess even went so far as to discuss the issue with his personal accountant immediately after the May 2015 meeting.

Q. When do you think is the first time you had those discussions with Clark Moore?

A. It would have been sometime after our meeting on May 28th.

Q. Within a couple months at least?

A. Probably.

Q. **And did you express concern about whether or not you got 50 percent of the profit of the prior years to Clark Moore?**

A. I did. I believe I probably discussed that with him.

(R.590, I.113 Lines 5-15).

Hess was actually on notice of the main issue of Dr. Morphis taking a salary from MPG. He testified he was told by the MPG accountant that Dr. Morphis was receiving compensation from the practice.

Q. Do you recall hearing something from Tom who gave you the idea that Dr. Morphis might be taking compensation out of the practice?

A. Yes.

(R.587, I.110 Lines 1-9).

Hess also was aware Dr. Morphis was taking an automobile expense out of Lancaster. He saw it on bank statements that he obtained. (R.547-448, I.62-63, Lines 23-25, Lines 2-7).

Hess's counsel reaffirmed the admissions in oral argument before the court of appeals:

> Judge Hewitt: I don't think it's disputed, I don't think you would dispute that your client suspected well outside the three-year limitations period that he was not being compensated according to his employment agreement. You would concede that right?
>
> Rothstein: He had suspicions. No question about it.

(Recording of 11/7 Oral Argument, https://media.sccourts.org/COA_Videos/2022-001589.mp4).

The court of appeals ignored these admissions in its order.

The court of appeals decision is inconsistent with *Dean v. Ruscon Corp.* (and other cases) in which this court held that it does not matter that a plaintiff is fully aware of his claim and, relatedly, does not know all the facts relevant to his claim., *Dean v. Ruscon Corp.* 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996).

> Here, the evidence establishes that Dean acted promptly by retaining consultants in November 1984 to inspect the damage. As a result, Dean was warned that the crack might expand. In fact, Dean conceded that she believed the damage to her building resulted from the pile driving activities of 1984 … the fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial.

Dean v. Ruscon Corp., 321 S.C. 360, 365–66, 468 S.E.2d 645, 648 (1996).

The decision is also inconsistent with this court's decisions in *Benton v. Roger C. Peace Hosp., Snell v. Columbia Gun Exch., Inc., Wiggins v. Edwards,* and *Garner v. Houck.* In those cases, this court held: (1) The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to "act with some promptness;" (2) The statute of limitations begins to run when a cause

of action reasonably ought to have been discovered. In determining whether the cause of action should have been discovered, it must be decided when the facts and circumstances of the injury would put a person of common knowledge on notice that some right has been invaded or the claim against another party exists;" and (3) "The date on which discovery should have been made is an objective, not subjective, question." *Benton v. Roger C. Peace Hosp.,* 313 S.C. 520, 443 S.E.2d 537 (1994); *Snell v. Columbia Gun Exch., Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981); *Wiggins v. Edwards,* 314 S.C. 126, 442 S.E.2d 169 (1994); *Garner v. Houck,* 312 S.C. 481, 435 S.E.2d 847 (1993); *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (Defendant stonewalled requests for information.).

The decision in this case establishes that a plaintiff is now entitled to all information concerning a financial decision prior to the statute of limitations starting on his claim. The decision is inconsistent with the above caselaw because the court of appeals held that Hess's alleged unawareness of all the facts prevents the statute of limitations from running. In fact, similar to the plaintiff in *Kreutner*, MPG flatly told Hess he wasn't going to get all the information he sought.

It is incredible that the court of appeals held the statute did not run when Hess admitted that, outside the limitations period, he formed the belief he was being underpaid, consulted with a CPA on the issue, took significant steps to investigate whether he was getting 50%, was flatly told he was not going to be given further financial information, and the MPG accountant refused to answer his question of whether he was really getting 50%.

The decision also establishes that an employer has a duty to disclose full financial information to an employee if that information might impact a financial decision the employee is considering regarding his employment. The court of appeals opinion did not address Morphis's

argument that no such duty to disclose is created by the mere existence of the employment relationship. *See, In re Hunnicut*, 466 B.R. 797, 801 (Bankr. D.S.C. 2011) ("No trust exists in a simple employer/employee relationship. Such a relationship is merely comprised of an agreement for the employee to perform work and the employer to compensate him for the work he performs.") (citing *Burwell v. S.C. Nat. Bank*, 340 S.E.2d 786, 790 (S.C. 1986)). Similarly, a contract, unless it is "intrinsically fiduciary" does not create a duty to disclose. *See, e.g., Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601, 605 (1967). Therefore, Morphis did not have an obligation to disclose her full financial information to Hess.

Finally, the court of appeals decision to toll the statute until such time as full financial disclosure was made (if ever) is contrary to this court's precedent that tolling only applies in "extraordinary" circumstances. Further, it only applies if a defendant lulls a plaintiff into not filing a lawsuit by promising settlement or cure. MPG did no such thing and, in fact, told Hess he wasn't going to get the information he sought. *See, e.g., Hopkins v. Floyd's Wholesale,* 299 S.C. 127, 382 S.E.2d 907 (1989) (plaintiff promised claim would be paid).

Hess misapprehends the caselaw differences regarding tolling, estoppel, and the discovery rule. The statute of limitations begins to run once the requirements of the discovery rule are met, *i.e.*, that a plaintiff knows, or by exercise of reasonable diligence, should have known, he has a claim. *See, e.g., Walbeck v. I'On Co., LLC*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019). The test is objective and the South Carolina's statute of limitations requires "very little to start the clock." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir.1994) (applying South Carolina law).

Concealment of financial data that Hess might have found useful to verify his bonus is just not relevant. Hess made plain that he believed he wasn't getting properly paid and that he

formed this belief outside the limitations period. Concealment of data, and even providing misleading information regarding his bonus, is just not germane to the discovery rule. "Discovery" is what matters-not the accuracy of what a plaintiff is told regarding the contract payment.

Hess asserts that "tolling" applies to the statute of limitations if there is any concealment of information. This is confusing the caselaw. The statute begins to run as soon as plaintiff learns, or should have learned, he had a claim. How much was concealed from him is irrelevant to that question. Hess cites *Strong v. Univ. of S.C. Sch. of Med.*, as support for this assertion. *Strong v. Univ. of S.C. Sch. of Med.,* 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994). However, *Strong* is actually the opposite of what Hess argues. In *Strong*, the court held that the statute would not begin to run if there was a duty to disclose (in that case, the doctor-patient relationship). However, once a doctor disclosed that Strong had been mistreated, the court held that the statute began to run, even though the disclosure was not full and complete. Hess admits he had formed the belief outside the statute of limitation, based on information available to him, that his bonus was not correct. *Strong*, therefore supports Morphis's arguments.

It is notable that, unlike in *Strong*, a business has no duty of disclosure to an employee. *See, In re Hunnicut*, 466 B.R. 797, 801 (Bankr. D.S.C. 2011) ("No trust exists in a simple employer/employee relationship. Such a relationship is merely comprised of an agreement for the employee to perform work and the employer to compensate him for the work he performs.") (citing *Burwell v. S.C. Nat. Bank*, 340 S.E.2d 786, 790 (S.C. 1986)). Similarly, a contract, unless it is "intrinsically fiduciary" does not create a duty to disclose. *See, e.g., Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601, 605 (1967). Therefore, Morphis did not have an obligation to disclose her full financial information to Hess.

Hess just ignores all the caselaw that holds it takes very little to start the clock, and that full awareness, or the receipt of nearly all information needed, is not a requirement. In *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) the court held that the employer's refusal to answer questions about bonus calculations was enough to start the statute of limitations running. Hess admitted to far more awareness of his claims than did Maher. *Strong* was similar in that, as soon as a doctor made a medical note that lack of care caused the injury, the clock began to run. The fact that Strong was blind and didn't know of this note until someone read the records for him could not toll the clock. 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994). *See also, Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996) (The fact an injured party may not comprehend the full extent of the damage is immaterial.). In other words, the discovery rule does not "require absolute certainty [that] a cause of action exists before the statute of limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001); *Joubert v. South Carolina,* 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000) ("We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.") (quoting *Dean v. Ruscon Corp.,* 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996)). *See also Burgess v. American Cancer Soc'y,* 300 S.C. 182, 386 S.E.2d 798 (Ct.App.1989) (holding statute starts to run upon discovery of such facts as would have led to knowledge thereof if pursued with reasonable diligence). In fact, constructive receipt of information that should cause a party to conduct an investigation which would lead to knowledge of a claim is all that is required. See, e.g., *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 187, 386 S.E.2d 798, 801 (Ct. App. 1989) (in malpractice action, client's knowledge his

attorney was having affair with agent of the defendant "constitutes such knowledge of existing facts which were sufficient to put Burgess on inquiry and had she pursued such inquiry, it would have disclosed the alleged communications [of privileged information from attorney to defendant]."); *see also*, *Walter J. Klein Co. v. Kneece,* 239 S.C. 478, 123 S.E.2d 870 (1962) (all that is needed is information "sufficient to put said party on inquiry which, if developed, will disclose the alleged fraud." (citing *Tucker v. Weathersbee,* 98 S.C. 402, 82 S.E. 638 (1914)).

It is true that tolling (a separate concept from the discovery rule) can stop the statute from running but only if the fraud is to forestall a plaintiff from filing—such as agreeing to settle or tto pay the amount due. Hess misapplies tolling by claiming that the statute is stopped anytime there is some evidence of concealment of information. *Strong,* and the cases cited above, prove the opposite. As soon as there was enough disclosure to put the plaintiff on notice of a claim, the courts hold that the statute is running. *See, also, Hopkins v. Floyd's Wholesale,* 299 S.C. 127, 382 S.E.2d 907 (1989) (plaintiff promised claim would be paid).

> **("[E]quitable tolling is a doctrine that should be used sparingly** and only when the interests of justice compel its use."); *Kelly v. Logan, Jolley, & Smith, L.L.P.,* 383 S.C. 626, 639, 682 S.E.2d 1, 8 (Ct.App.2009) **("[F]or equitable estoppel to apply, a plaintiff must be *aware* that a claim might exist prior to the expiration of the statute of limitations, but due to some conduct or representation by the defendant, the plaintiff is induced ... to delay in filing suit**." (alteration in original) (internal quotation marks omitted)).

Campbell v. Guignard, No. 2015-UP-293, 2015 WL 3819059, at *1 (S.C. Ct. App. June 17, 2015) (emphasis added).

Therefore, for all the above reasons, Hess's claims should have been barred by the three-year statute of limitations.

A Plaintiff May Not Recover a Bonus on the Theory that the Employer Failed to Provide Notice.

Hess' claim to damages in 2015 is based on a notification requirement within the South Carolina Wage Payment Act. That notification requirement requires that "Any changes in these terms must be made in writing at least seven calendar days before they become effective." S.C. Code Ann. § 41-10-30. That Act has a separate provision, at 41-10-40 and 41-10-50, for failure to pay wages under a wage agreement. The remedy section of the Act provides:

> (A) Any employer who violates the provisions of Section 41-10-30 must be given a written warning by the Director of the Department of Labor, Licensing and Regulation or his designee for the first offense and must be assessed a civil penalty of not more than one hundred dollars for each subsequent offense.
>
> (B) Any employer who violates the provisions of Section 41-10-40 must be assessed a civil penalty of not more than one hundred dollars for each violation. Each failure to pay constitutes a separate offense.
>
> (C) In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due.
>
> (D) The Director of the Department of Labor, Licensing and Regulation or his designee shall promulgate regulations to establish a procedure for administrative review of any civil penalty assessed by the Director.

S.C. Code Ann. § 41-10-80.

The court of appeals held, without addressing any of Morphis's arguments, or providing a rationale, that a notice violation, which is at 41-10-30(A), includes full civil remedies even though 41-10-80(A) defines the remedy for a 41-10-30(A) violation as only a fine.

Only 41-10-80(C) provides remedies beyond a fine for failure to pay wages due (not notice violations).

The trial court denied JNOV on this argument on the basis that § 41–10–40 (medium of payment and withholding and diverting) mentions 41-10-30, and the remedy for a violation of § 41-10-40 includes, in § 41-10-80, full remedies. Even assuming this rationale is the same that the court of appeals used, this is an incorrect construction. The mention of § 41-10-30 in § 41-10-40 concerns only wage deductions. This case does not involve wage deductions. If the legislature had intended to impose any consequences for violation of section 41-10-30 in addition to those imposed by section 41-10-80, it would have expressly provided for them, and there is no provision in the Act other than section 41-10-80 addressing the failure of an employer to comply with the notice requirement of section 41-10-30(A). *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("the court will give words their plain and ordinary meaning[ ] and will not resort to forced construction …"); *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together …."); *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("isolated phrases [are irrelevant] Instead, we read the statute as a whole and in a manner consonant and in harmony …."). Ambiguity, must be resolved by the canon "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius,*" which means "to express or include one thing implies the exclusion of another, or of the alternative." *State v. Leopard*, 349 S.C. 467, 472–73, 563 S.E.2d 342, 345 (Ct. App. 2002).

The court of appeals did not even mention *Barton v. House of Raeford Farms, Inc* in which the court held there was no damages remedy available to Plaintiff for a notification violation.

> Nonetheless, reading § 41–10–30(A) as plaintiffs would have it would still not provide the plaintiffs with a remedy, as the S.C. Wages Act specifies that the remedy for an employer's violation of § 41–10–30 is "a written warning by the Director of the Department of Labor, Licensing, and Regulation or his designee for the first offense and

> ... a civil penalty of not more than one hundred dollars for each subsequent offense." S.C. Code Ann. § 41–10–80(A).

Barton v. House of Raeford Farms, Inc., 745 F.3d 95, 108 (4th Cir. 2014).

The court of appeals decision is also directly contrary to the earlier unpublished decision in *Gould v. Worldwide Apparel LLC*, 2019 WL 3216893 (S.C. Ct. App. 2016) (unpublished) in which the court held that a notice violation does not give a plaintiff a right to money damages. In contrast to this case, the *Gould* court conducted a careful examination of the statutory construction and held that the clear meaning of the statutes dictated that there was no remedy for a notice violation. In summary, the court ruled that, because the legislature created a separate remedy for notice violations and a separate remedy for "failure to pay" violations, a court could not merge the two. The Appellant understands that *Gould* is an "unpublished" decision and that, under Rule 268(d)(2) normally should not be cited, however the rule against citation is in conflict with Rule 219 requiring uniformity of decisions. Because of the direct conflict of these two decisions, Appellant feels it is obligated to bring the matter to the court's attention.

As the *Gould* court reasoned, the decision in this case violates statutory construction precedent in South Carolina. If the legislature had intended to impose any consequences for violation of section 41-10-30 beyond a fine, it would have expressly provided for it, and there is no provision in the Act other than section 41-10-80 addressing the failure of an employer to comply with the notice requirement of section 41-10-30(A).

To read a full money damages remedy into the stature, one must improperly read out the only remedy mentioned: the fine.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals on the above questions

should be reversed.

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